

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

MANN V. RICH

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GAYLE MANN, APPELLANT,
V.
LAZELL RICH, APPELLEE.

Filed May 1, 2012. No. A-11-462.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge.
Reversed.

On brief, Mark F. Jacobs, of Family & Juvenile Law Omaha, Christensen & Madara-Campbell, P.C., L.L.O., for appellant.

Lazell Rich, pro se.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Gayle Mann (Gayle) appeals from an order of the district court which modified a decree by awarding custody of the parties' minor children to Lazell Rich (Lazell). On appeal, Gayle asserts that the district court erred in finding that a change in custody was warranted. We agree with Gayle. Lazell failed in his duty to present evidence showing that a material change of circumstances had occurred warranting a change in custody. We reverse the order of the district court changing custody of the children to Lazell. We explain below.

II. BACKGROUND

This appeal involves the parties' continuing dispute over custody of their two minor children: a child born in October 1998 and a child born in November 2000. The custody proceedings have been ongoing since August 2006, when a decree of paternity was entered

determining that Lazell is the father of the children and awarding custody of the children to Gayle, subject to Lazell's reasonable rights of visitation.

On December 11, 2006, approximately 3 months after the decree was entered, Lazell filed an application to modify the decree of paternity to award him custody of the children. In the application, Lazell alleged that there had been a material change of circumstances since the entry of the August decree of paternity in that (1) Gayle had denied Lazell his court-ordered visitation time with the children on numerous occasions, (2) Gayle had spoken negatively about Lazell in front of the children, (3) Gayle had not maintained proper health care for the children, and (4) Gayle had "consistently spank[ed] the children for ridiculous reasons."

On March 21, 2007, a hearing was held on Lazell's application to modify the decree of paternity. Gayle did not appear at this hearing, but Lazell presented evidence in support of his application. The hearing continued on June 29. Gayle did appear in court and present evidence on the second day of the hearing. At the close of the hearing, the district court issued an order modifying the decree of paternity by awarding Lazell custody of the children, subject to Gayle's reasonable rights of visitation.

Gayle appealed to this court from the district court's order modifying the decree of paternity. See *Mann v. Rich*, 16 Neb. App. 848, 755 N.W.2d 410 (2008) (*Mann I*). While her appeal was pending, the children remained in Lazell's custody pursuant to the district court's order.

In *Mann I*, we found that Gayle was not afforded procedural due process because there was insufficient evidence to establish that she received notice of the March 21, 2007, hearing on Lazell's application to modify the decree of paternity. As a result of this finding, we reversed the order of the district court which modified the decree of paternity and remanded the matter for a new hearing on the issue of custody of the parties' minor children. On December 23, 2008, the mandate of this court was issued.

After our mandate issued, the district court held a hearing concerning temporary custody of the children while a new hearing on Lazell's application to modify was pending. Ultimately, the district court awarded Lazell temporary custody of the children. The court indicated that it did not want to "uproot" the children from Lazell's home because they had been living there during the 18 months Gayle's appeal had been pending.

In October and November 2009, a new hearing was held on Lazell's application to modify the decree of paternity. Prior to the start of this hearing, the district court informed the parties, "All I want to hear is evidence of things that occurred between the time the [original paternity] decree was entered in August of 2006 and the time [Lazell] filed [his] motion in December of 2006 that justifies a change in custody."

Based on the district court's instructions, the parties focused their presentation of evidence on events that had occurred between August and December 2006. Such evidence revealed that during this period of time, the parties did not get along with each other and struggled to communicate effectively. Lazell presented evidence to demonstrate that Gayle hindered his relationship with the children. Gayle presented evidence to demonstrate that she was afraid of Lazell and that the children felt more comfortable with her than with Lazell.

After the hearing, the district court entered an order modifying the original decree of paternity such that Lazell was granted custody of the parties' children. Gayle appealed the

district court's order to this court. See *Mann v. Rich*, 18 Neb. App. 849, 794 N.W.2d 183 (2011) (*Mann II*). While Gayle's appeal was pending, the children remained in Lazell's custody pursuant to the district court's order.

In *Mann II*, we found that the district court erred in limiting the presentation of evidence at the hearing and in basing its decision about custody of the children on the parties' circumstances as they existed 3 years prior to the time of the hearing in 2009. As a result of our finding, we reversed the district court's decision to modify the decree of paternity and remanded the matter with directions to hold a new hearing where the parties could present evidence of their current circumstances. We specifically indicated that the new hearing should include evidence of events that occurred after December 2006 through the time of the new hearing. In addition, we indicated that the district court should hold a new hearing concerning temporary custody of the children pending a new modification hearing. On February 22, 2011, the mandate of this court was issued.

After our mandate issued, the district court did not hold a new hearing concerning temporary custody of the children as we had directed. The district court indicated that "neither party requested such a hearing . . . and, therefore, the children have remained in the primary care of [Lazell]."

Instead of holding a temporary hearing, the district court proceeded to hold a new modification hearing. In April 2011, a third hearing was held on Lazell's application to modify the decree of paternity. At this hearing, the parties presented evidence similar in nature to the evidence presented at the previous hearing. And, at this hearing, there was nothing to indicate that the parties were limited in their presentation of evidence about events that occurred after Lazell filed his application to modify in December 2006. In particular, the evidence revealed that Gayle and Lazell continued to not get along with each other and continued to struggle to communicate effectively. Lazell again presented evidence to demonstrate that when Gayle had custody of the children, she hindered his relationship by denying him court-ordered visitation time and by speaking negatively about him in front of the children. Gayle again presented evidence to demonstrate that she was afraid of Lazell and that the children wanted to live with her rather than with Lazell. Gayle offered evidence to show that on more than one occasion Lazell had struck their oldest child with a belt to punish him and that she had taken the child to the emergency room as a result of his injuries.

In addition to the evidence presented by the parties, the children's guardian ad litem testified and presented a report of her findings to the district court. Such evidence indicated that even though Gayle and Lazell both love their children very much, they do not get along with each other and have trouble putting their differences aside for the benefit of the children. The guardian ad litem noted that the children want to live with Gayle; however, the guardian ad litem ultimately recommended that the children continue to live with Lazell because "they've been with [Lazell] for a while" and "[t]here is structure and discipline at [Lazell's] house."

After the hearing, the district court entered an order again modifying the original decree of paternity such that Lazell was granted custody of the parties' children. Specifically, the court found:

The evidence preponderates in a finding that both [Lazell and Gayle] love and care about their children and that each maintains a clean and appropriate residence. However, the

evidence further preponderates in a finding that there is more structure and discipline in the home of the father and that the mother continues to disparage [Lazell] and continues to place the minor children in the middle of the continuing litigation between [Lazell and Gayle].

The court also noted that in deciding to modify the original decree of paternity, it had considered that the children desired to live with Gayle rather than with Lazell.

Gayle appeals from the district court's order.

III. ASSIGNMENT OF ERROR

On appeal, Gayle alleges that the district court abused its discretion by modifying the decree of paternity to grant Lazell custody of the parties' children.

IV. ANALYSIS

1. STANDARD OF REVIEW

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determinations will normally be affirmed absent an abuse of discretion. *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving the litigant of a substantial right and a just result. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

2. MODIFICATION OF CUSTODY ORDER

Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). On appeal, Gayle alleges that the district court erred in modifying the decree of paternity entered in August 2006. Specifically, she argues that the court erred in finding a material change of circumstances had occurred warranting a change in custody and in finding that it was in the children's best interests to award Lazell custody.

The party seeking modification of child custody bears the burden of showing a material change in circumstances. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.*

In its May 2011 order modifying the original custody order, the district court found that a material change of circumstances warranting a change in custody had occurred because Gayle has interfered with Lazell's parenting time with the children; Gayle has placed Lazell in a negative light in front of the children; and Gayle has disparaged Lazell when she speaks to the minor children about Lazell. Essentially, it appears that the district court found a material change of circumstances based upon the poor relationship between Gayle and Lazell.

Upon our de novo review of the record, we conclude that the district court erred in finding a material change of circumstances warranting a change in custody. Although it is clear

that the parties' circumstances have changed somewhat since the entry of the original custody order in August 2006, we do not find that any of these changes was significant enough to warrant a change in custody. Accordingly, we reverse the order of the district court granting custody of the children to Lazell.

Before we discuss the evidence presented at the modification hearing, we note that there has been an obvious change in the children's living situation since the August 2006 custody order. At the time the decree was entered in August 2006, the children were in Gayle's custody. They remained in her custody at the time Lazell filed his application to modify in December 2006 and during the pendency of the first proceedings on Lazell's application. However, at the time of the April 2011 hearing, the children were in Lazell's custody and had been living with him for approximately 3½ years. However, the fact that the children have been residing with Lazell for 3½ years is not due to any change in circumstances, but, rather, due to the unusual procedural circumstances of this case, including the district court's decision to award temporary custody of the children to Lazell pending the final resolution of the custody proceedings. Because the change in the children's living situation is not due to any change in the parties' circumstances, we do not consider it as a factor in our decision concerning whether there has been a material change of circumstances warranting a change in custody.

We now turn to our discussion of the specific evidence presented by the parties at the modification hearing.

At the modification hearing, there was evidence that Lazell and Gayle both love their children very much. There was evidence that Lazell is an involved father who spends time with the children and provides them with structure. Lazell testified that his children's academic performance is very important and that he works hard to ensure that the children have a good education. In addition, he testified that he has strict rules at his home which include chores for each child and eating only healthy foods at snack time. The children's guardian ad litem testified that Lazell's house is very clean and appropriate and that the children appear well-cared for there.

Similarly, Gayle presented evidence to demonstrate that she is very involved in her children's lives. Gayle spends as much time as she can with the children and attends all of their school and extracurricular activities. She regularly helps them with their homework and drops them off and picks them up from their activities and sporting events. Gayle testified that she provides the children with whatever they need, including clothing, shoes, food, and toys. The children's guardian ad litem never visited Gayle's home; however, there was no evidence to indicate that Gayle's home is not also clean and appropriate.

Contrary to the evidence demonstrating Lazell's and Gayle's obvious love for their children, there was other evidence presented at the modification hearing to demonstrate that both parties have weaknesses in their parenting styles and abilities and that such weaknesses are exacerbated by their contentious relationship with each other. There was evidence that Lazell has been accused of physically abusing the parties' oldest child on two occasions. And, while Lazell has never been found guilty of child abuse, he admitted at the modification hearing that he occasionally disciplines the children by hitting them with a belt. He did not indicate that he believed there to be a problem with this form of discipline, but Gayle indicated that she has been concerned about the children when they are in Lazell's care.

In addition, there was evidence that Lazell has a history of problems with his domestic partners. Multiple women, including Gayle, have obtained protection orders against Lazell as a result of allegations of violence. In fact, Gayle testified at length about how she was still afraid of Lazell because of his treatment of her when they were together. However, Gayle did not provide much detail about these circumstances.

Finally, there was evidence that Lazell works long hours at his job and that, as a result, the children spend a great deal of time with their paternal grandmother. Gayle testified that the children go to their grandmother's home after school and stay there until after dinner. This has been a point of contention between Lazell and Gayle, because Gayle has repeatedly indicated that the children could be with her during this time period.

There was evidence presented that Gayle does not communicate well with Lazell. Gayle testified that she is afraid of Lazell and does not like to have any contact with him. Gayle's fear of Lazell has hindered their ability to speak with each other about the children or about scheduling issues. Gayle testified that when she has custody of the children, she does not allow Lazell to have additional visitation time. In fact, there was some evidence that Gayle prevented Lazell from exercising his court-ordered visitation time with the children; however, there was conflicting evidence on this subject. It is clear from the record that Lazell has been much more flexible concerning visitation time since the children have been residing with him. Gayle admitted that she has had additional visitation time with the children since Lazell was awarded temporary custody.

In addition, Lazell testified that he believes that Gayle disparages him in front of the children and that this has affected his relationship with them. Lazell believes that Gayle has overly involved the children in the custody proceedings. Similarly, the children's guardian ad litem expressed some concern for whether the children were mimicking Gayle when asked about the custody situation and their living preferences.

Read as a whole, the evidence presented at the modification hearing reveals that both Lazell and Gayle are capable of providing their children with a stable home environment. They both love their children and support them academically, financially, and emotionally. However, Lazell's and Gayle's relationship with the children has been greatly affected by their poor relationship with each other. Neither party appears willing to put aside all of their differences to work together for the benefit of the children. But, this is not a recent development or a new problem. The parties have had a contentious relationship with each other since before the August 2006 decree of paternity was entered.

Upon our de novo review of the record, we find that there is not sufficient evidence in the record to demonstrate that a material change of circumstances has occurred. Gayle is a good mother who loves the children and is very involved in their life. She supports them in all of their academic and extracurricular endeavors. Gayle is able to provide the children with a stable and secure home environment. And, while there is evidence that Gayle does not work well with Lazell and that she can make things difficult between Lazell and the children, there is also evidence that this is not a new issue. The overwhelming evidence presented at the hearing demonstrated that the contentious relationship between Gayle and Lazell began long before the entry of the original custody order in August 2006. As a result, their poor relationship does not constitute a material change in circumstances. Moreover, while we encourage the parties to learn

to work together for the benefit of their two children, we do not find that a change in custody will solve the parties' problems.

V. CONCLUSION

Upon our de novo review of the record, we find that the district court abused its discretion in finding that a material change of circumstances had occurred since the entry of the August 2006 custody order which warranted a change in the custody of the minor children. Accordingly, we reverse the order of the district court granting custody of the children to Lazell.

REVERSED.